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ENGROSSED SECOND SUBSTITUTE HOUSE BILL 2961

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State of Washington

61st Legislature

2010 Regular Session

**By** House Health & Human Services Appropriations (originally sponsored by Representatives Campbell, Hurst, Morrell, Kelley, and Ormsby)

READ FIRST TIME 02/09/10.

1 AN ACT Relating to establishing a statewide electronic tracking  
2 system for the nonprescription sales of ephedrine, pseudoephedrine, and  
3 phenylpropanolamine; amending RCW 69.43.105, 69.43.110, and 42.56.240;  
4 adding new sections to chapter 69.43 RCW; and repealing RCW 69.43.170.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

6 **Sec. 1.** RCW 69.43.105 and 2005 c 388 s 2 are each amended to read  
7 as follows:

8 (1) For purposes of this section, "traditional Chinese herbal  
9 practitioner" means a person who is certified as a diplomate in Chinese  
10 herbology from the national certification commission for acupuncture  
11 and oriental medicine or who has received a certificate in Chinese  
12 herbology from a school accredited by the accreditation council on  
13 acupuncture and oriental medicine.

14 (2) A pharmacy licensed by, or shopkeeper or itinerant vendor  
15 registered with, the department of health under chapter 18.64 RCW, or  
16 an employee thereof, a practitioner as defined in RCW 18.64.011, or a  
17 traditional Chinese herbal practitioner may not knowingly sell,  
18 transfer, or otherwise furnish to any person a product at retail that  
19 he or she knows to contain any detectable quantity of ephedrine,

1 pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or  
2 salts of isomers, without first obtaining photo identification of the  
3 person that shows the date of birth of the person.

4 (3) A person buying or receiving a product at retail containing any  
5 detectable quantity of ephedrine, pseudoephedrine, or  
6 phenylpropanolamine, or their salts, isomers, or salts of isomers, from  
7 a pharmacy licensed by, or shopkeeper or itinerant vendor registered  
8 with, the department of health under chapter 18.64 RCW, or an employee  
9 thereof, a practitioner as defined in RCW 18.64.011, or a traditional  
10 Chinese herbal practitioner must first produce photo identification of  
11 the person that shows the date of birth of the person.

12 (4) Any product containing any detectable quantity of ephedrine,  
13 pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or  
14 salts of isomers, shall be kept (a) behind a counter where the public  
15 is not permitted, or (b) in a ((central location)) locked display case  
16 so that ((is not accessible by)) a customer((s without assistance of))  
17 wanting access must ask an employee of the merchant for assistance.

18 (5) No pharmacy licensed by, or shopkeeper or itinerant vendor  
19 registered with, the department of health under chapter 18.64 RCW, or  
20 an employee thereof, a practitioner as defined in RCW 18.64.011, or a  
21 traditional Chinese herbal practitioner may sell any product containing  
22 any detectable quantity of ephedrine, pseudoephedrine, or  
23 phenylpropanolamine, or their salts, isomers, or salts of isomers, to  
24 a person that is not at least eighteen years old.

25 (6) A pharmacy licensed by, or shopkeeper or itinerant vendor  
26 registered with, the department of health under chapter 18.64 RCW  
27 selling a nonprescription drug containing ephedrine, pseudoephedrine,  
28 phenylpropanolamine, or their salts, isomers, or salts of isomers shall  
29 require the purchaser to electronically or manually sign a record of  
30 the transaction. The record must include the name and address of the  
31 purchaser, the date and time of the sale, the name and initials of the  
32 shopkeeper, itinerant vendor, pharmacist, pharmacy technician, or  
33 employee conducting the transaction, the name of the product being  
34 sold, as well as the total quantity in grams, of ephedrine,  
35 pseudoephedrine, phenylpropanolamine, or their salts, isomers, or salts  
36 of isomers, being sold.

37 (7) The board of pharmacy, by rule, may exempt products containing  
38 ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts,

1 isomers, or salts of isomers, in combination with another active  
2 ingredient from the requirements of this section if they are found not  
3 to be used in the illegal manufacture of methamphetamine or other  
4 controlled dangerous substances. A manufacturer of a drug product may  
5 apply for removal of the product from the requirements of this section  
6 if the product is determined by the board to have been formulated in  
7 such a way as to effectively prevent the conversion of the active  
8 ingredient into methamphetamine. The burden of proof for exemption is  
9 upon the person requesting the exemption. The petitioner shall provide  
10 the board with evidence that the product has been formulated in such a  
11 way as to serve as an effective general deterrent to the conversion of  
12 pseudoephedrine into methamphetamine. The evidence must include the  
13 furnishing of a valid scientific study, conducted by an independent,  
14 professional laboratory and evincing professional quality chemical  
15 analysis. Factors to be considered in whether a product should be  
16 excluded from this section include but are not limited to:

17 (a) Ease with which the product can be converted to  
18 methamphetamine;

19 (b) Ease with which ephedrine, pseudoephedrine, or  
20 phenylpropanolamine is extracted from the substance and whether it  
21 forms an emulsion, salt, or other form;

22 (c) Whether the product contains a "molecular lock" that renders it  
23 incapable of being converted into methamphetamine;

24 (d) Presence of other ingredients that render the product less  
25 likely to be used in the manufacture of methamphetamine; and

26 (e) Any pertinent data that can be used to determine the risk of  
27 the substance being used in the illegal manufacture of methamphetamine  
28 or any other controlled substance.

29 ((+7)) (8) Nothing in this section applies:

30 (a) To any product containing ephedrine, pseudoephedrine, or  
31 phenylpropanolamine, or their salts, isomers, or salts of isomers that  
32 is not the only active ingredient and that is in liquid, liquid  
33 capsule, or gel capsule form;

34 (b) To the sale of a product that may only be sold upon the  
35 presentation of a prescription;

36 (c) To the sale of a product by a traditional Chinese herbal  
37 practitioner to a patient; or

1 (d) When the details of the transaction are recorded in a pharmacy  
2 profile individually identified with the recipient and maintained by a  
3 licensed pharmacy.

4 ~~((+8+))~~ (9)(a) No pharmacy licensed by, or shopkeeper or itinerant  
5 vendor registered with, the department of health under chapter 18.64  
6 RCW, a practitioner as defined in RCW 18.64.011, or a traditional  
7 Chinese herbal practitioner may retaliate against any employee that has  
8 made a good faith attempt to comply with the requirements of this  
9 section by requesting that a customer present photo identification,  
10 making a reasonable effort to determine the customer's age.

11 (b) No pharmacy licensed by, or shopkeeper or itinerant vendor  
12 registered with, the department of health under chapter 18.64 RCW, a  
13 practitioner as defined in RCW 18.64.011, or a traditional Chinese  
14 herbal practitioner is subject to prosecution under subsection ~~((+9+))~~  
15 (10) of this section if they made a good faith attempt to comply with  
16 the requirements of this section by requesting that a customer present  
17 photo identification, making a reasonable effort to determine the  
18 customer's age.

19 ~~((+9+))~~ (10) A violation of this section is a gross misdemeanor.

20 **Sec. 2.** RCW 69.43.110 and 2005 c 388 s 4 are each amended to read  
21 as follows:

22 (1) It is unlawful for a pharmacy licensed by, or shopkeeper or  
23 itinerant vendor registered with, the department of health under  
24 chapter 18.64 RCW, or an employee thereof, or a practitioner as defined  
25 in RCW 18.64.011, knowingly to sell, transfer, or to otherwise furnish,  
26 in a single transaction(~~(+~~

27 ~~(a) More than two packages of one or more products that he or she  
28 knows to contain ephedrine, pseudoephedrine, or phenylpropanolamine,  
29 their salts, isomers, or salts of isomers; or~~

30 ~~(b))~~ a ~~((single package of any product that he or she knows to  
31 contain))~~ total of more than ~~((three))~~ 3.6 grams of ephedrine,  
32 pseudoephedrine, or phenylpropanolamine, their salts, isomers, or salts  
33 of isomers, ~~((or a combination of any of these substances))~~ in any  
34 twenty-four hour period or more than a total of nine grams per  
35 purchaser in any thirty-day period.

36 (2) It is unlawful for a person who is not a manufacturer,  
37 wholesaler, pharmacy, practitioner, shopkeeper, or itinerant vendor

1 licensed by or registered with the department of health under chapter  
2 18.64 RCW to purchase or acquire(~~(, in any twenty-four hour period,)~~)  
3 more than (~~(the quantities)~~) 3.6 grams in any twenty-four hour period,  
4 or more than a total of nine grams in any thirty-day period, of the  
5 substances specified in subsection (1) of this section.

6 (3) It is unlawful for any person to sell or distribute any of the  
7 substances specified in subsection (1) of this section unless the  
8 person is licensed by or registered with the department of health under  
9 chapter 18.64 RCW, or is a practitioner as defined in RCW 18.64.011.

10 (4)(a) Beginning July 1, 2011, or the date upon which the  
11 electronic sales tracking system established under section 3 of this  
12 act is available, whichever is later, a pharmacy licensed by, or  
13 shopkeeper or itinerant vendor registered with, the department of  
14 health under chapter 18.64 RCW shall, before completing a sale under  
15 this section, submit the required information to the electronic sales  
16 tracking system established under section 3 of this act, as long as  
17 such a system is available without cost to the pharmacy, shopkeeper, or  
18 itinerant vendor for accessing the system. The pharmacy, shopkeeper,  
19 or itinerant vendor may not complete the sale if the system generates  
20 a stop sale alert, except as permitted in section 3 of this act.

21 (b) If a pharmacy, shopkeeper, or itinerant vendor selling a  
22 nonprescription drug containing ephedrine, pseudoephedrine, or  
23 phenylpropanolamine, or their salts, isomers, or salts of isomers  
24 experiences mechanical or electronic failure of the electronic sales  
25 tracking system and is unable to comply with the electronic sales  
26 tracking requirement, he or she shall maintain a written log or an  
27 alternative electronic recordkeeping mechanism until such time as he or  
28 she is able to comply with the electronic sales tracking requirement.

29 (c) A pharmacy, shopkeeper, or itinerant vendor selling a  
30 nonprescription drug containing ephedrine, pseudoephedrine, or  
31 phenylpropanolamine, or their salts, isomers, or salts of isomers may  
32 seek an exemption from submitting transactions to the electronic sales  
33 tracking system in writing to the board of pharmacy stating the reasons  
34 for the exemption. The board may grant an exemption for good cause  
35 shown, but in no event shall a granted exemption exceed one hundred  
36 eighty days. The board may grant multiple exemptions for any pharmacy,  
37 shopkeeper, or itinerant vendor if the good cause shown indicates  
38 significant hardship for compliance with this section. A pharmacy,

1 shopkeeper, or itinerant vendor that receives an exemption shall  
2 maintain a logbook in hardcopy form and must require the purchaser to  
3 provide the information required under this section before the  
4 completion of any sale. The logbook shall be maintained as a record of  
5 each sale for inspection by any law enforcement officer or board  
6 inspector during normal business hours. For purposes of this  
7 subsection (4)(c), "good cause" includes, but is not limited to,  
8 situations where the installation of the necessary equipment to access  
9 the system is unavailable or cost prohibitive to the pharmacy,  
10 shopkeeper, or itinerant vendor.

11 (d) A pharmacy, shopkeeper, or itinerant vendor may withdraw from  
12 participating in the electronic sales tracking system if the system is  
13 no longer being furnished without cost for accessing the system. A  
14 pharmacy, shopkeeper, or itinerant vendor who withdraws from the  
15 electronic sales tracking system is subject to the same requirements as  
16 a pharmacy, shopkeeper, or itinerant vendor who has been granted an  
17 exemption under (c) of this subsection.

18 (e) For the purposes of this subsection (4) and section 3 of this  
19 act:

20 (i) "Cost for accessing the system" means costs relating to:

21 (A) Access to the web-based electronic sales tracking software,  
22 including inputting and retrieving data;

23 (B) The web-based software known as software as a service;

24 (C) Training; and

25 (D) Technical support to integrate to point of sale vendors, if  
26 necessary.

27 (ii) "Cost for accessing the system" does not include:

28 (A) Costs relating to required internet access;

29 (B) Optional hardware that a pharmacy may choose to purchase for  
30 work flow purposes; or

31 (C) Other equipment.

32 (5) A violation of this section is a gross misdemeanor.

33 NEW SECTION. Sec. 3. A new section is added to chapter 69.43 RCW  
34 to read as follows:

35 (1) The board of pharmacy shall implement a real-time electronic  
36 sales tracking system to monitor the nonprescription sale of products  
37 in this state containing any detectable quantity of ephedrine,

1 pseudoephedrine, phenylpropanolamine, or their salts, isomers, or salts  
2 of isomers, provided that the system is available to the state without  
3 cost for accessing the system to the state or retailers. The board is  
4 authorized to enter into a public-private partnership, through a  
5 memorandum of understanding or similar arrangement, to make the system  
6 available.

7 (2) The records submitted to the tracking system are for the  
8 confidential use of the pharmacy, shopkeeper, or itinerant vendor who  
9 submitted them, except that:

10 (a) The records must be produced in court when lawfully required;

11 (b) The records must be open for inspection by the board of  
12 pharmacy; and

13 (c) The records must be available to any general or limited  
14 authority Washington peace officer to enforce the provisions of this  
15 chapter or to federal law enforcement officers.

16 (3) The electronic sales tracking system shall be capable of  
17 generating a stop sale alert, which shall be a notification that  
18 completion of the sale would result in the seller or purchaser  
19 violating the quantity limits in RCW 69.43.110 (1) and (2). The system  
20 shall contain an override function for use by a dispenser of ephedrine,  
21 pseudoephedrine, phenylpropanolamine, or their salts, isomers, or salts  
22 of isomers, who has a reasonable fear of imminent bodily harm. Each  
23 instance in which the override function is utilized shall be logged by  
24 the system.

25 (4) The board of pharmacy shall have the authority to adopt rules  
26 necessary to implement and enforce the provisions of this section.

27 (5) The board of pharmacy may not raise licensing or registration  
28 fees to fund the rule making or implementation of this section.

29 NEW SECTION. **Sec. 4.** A new section is added to chapter 69.43 RCW  
30 to read as follows:

31 A pharmacy, shopkeeper, or itinerant vendor participating in the  
32 electronic sales tracking system under RCW 69.43.110(4):

33 (1) Is not liable for civil damages resulting from any act or  
34 omission in carrying out the requirements of RCW 69.43.110(4), other  
35 than an act or omission constituting gross negligence or willful or  
36 wanton misconduct; and

1 (2) Is not liable for civil damages resulting from a data breach  
2 that was proximately caused by a failure on the part of the electronic  
3 sales tracking system to take reasonable care through the use of  
4 industry standard levels of encryption to guard against unauthorized  
5 access to account information that is in the possession or control of  
6 the system.

7 **Sec. 5.** RCW 42.56.240 and 2008 c 276 s 202 are each amended to  
8 read as follows:

9 The following investigative, law enforcement, and crime victim  
10 information is exempt from public inspection and copying under this  
11 chapter:

12 (1) Specific intelligence information and specific investigative  
13 records compiled by investigative, law enforcement, and penology  
14 agencies, and state agencies vested with the responsibility to  
15 discipline members of any profession, the nondisclosure of which is  
16 essential to effective law enforcement or for the protection of any  
17 person's right to privacy;

18 (2) Information revealing the identity of persons who are witnesses  
19 to or victims of crime or who file complaints with investigative, law  
20 enforcement, or penology agencies, other than the commission, if  
21 disclosure would endanger any person's life, physical safety, or  
22 property. If at the time a complaint is filed the complainant, victim,  
23 or witness indicates a desire for disclosure or nondisclosure, such  
24 desire shall govern. However, all complaints filed with the commission  
25 about any elected official or candidate for public office must be made  
26 in writing and signed by the complainant under oath;

27 (3) Any records of investigative reports prepared by any state,  
28 county, municipal, or other law enforcement agency pertaining to sex  
29 offenses contained in chapter 9A.44 RCW or sexually violent offenses as  
30 defined in RCW 71.09.020, which have been transferred to the Washington  
31 association of sheriffs and police chiefs for permanent electronic  
32 retention and retrieval pursuant to RCW 40.14.070(2)(b);

33 (4) License applications under RCW 9.41.070; copies of license  
34 applications or information on the applications may be released to law  
35 enforcement or corrections agencies;

36 (5) Information revealing the identity of child victims of sexual  
37 assault who are under age eighteen. Identifying information means the

1 child victim's name, address, location, photograph, and in cases in  
2 which the child victim is a relative or stepchild of the alleged  
3 perpetrator, identification of the relationship between the child and  
4 the alleged perpetrator; (~~and~~)

5 (6) The statewide gang database referenced in RCW 43.43.762; and

6 (7) Data from the electronic sales tracking system established in  
7 section 3 of this act.

8 NEW SECTION. Sec. 6. RCW 69.43.170 (Ephedrine, pseudoephedrine,  
9 phenylpropanolamine--Pilot project to record retail transactions--  
10 Penalty) and 2005 c 388 s 8 are each repealed.

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